IN THE CHILDREN'S COURT OF VICTORIA
CRIMINAL DIVISION

VICTORIA POLICE Informant

v

AC Accused

MAGISTRATE:	ROZENCWAJG
DATE OF HEARING:	16.9.2024
DATE OF DECISION:	2.10.2024
CASE MAY BE CITED AS:	Victoria Police v AC [2024] VChC 2

REASONS FOR DECISION

Catchwords: Accused is a 16 years old First Nations child with an intellectual disability, charged with intentionally causing serious injury and related charges – *voir dire* re admissibility of record of interview – whether ROI should be excluded under s90 *Evidence Act 2008* – role of independent person – operation of s464E *Crimes Act 1958* – ROI excluded.

APPEARANCES:	Counsel
For Victoria Police	Ms McGregor
For the Accused	Mr O'Connell

HIS HONOUR:

1. On 1.9.2023 the accused child [AC] was arrested in relation to a stabbing at the [*name deleted*] railway station the day before. A record of interview [ROI] was conducted at the [*name deleted*] police station by [*detective P1*] with [*police officer P2*] as corroborator. Also present was [*I3P*] as an independent person. During the course of the ROI, AC made significant admissions in relation to the incident.

2. At that time AC was aged 16 being born on [*date deleted*].

3. AC is a First Nations person and also suffers from an intellectual disability. The statement under the *Disability Act 2006* dated 25.9.23 refers to the concurrent existence of significant sub-average general intellectual functioning and significant deficits in adaptive behaviour.

Section 90 of the *Evidence Act 2008*

4. Mr O'Connell, counsel for AC, has submitted the ROI should be excluded under a variety of discretions contained in the *Evidence Act 2008*.

5. In the circumstances, I do not consider it necessary for me to address each of the submissions as ultimately this matter lies to be determined under s90 of the *Evidence Act 2008*. That section reads:

> "In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if–
> a) the evidence is adduced by the prosecution; and
> b) having regard to the circumstances in which the admission was made, it would be unfair to an accused to use the evidence."

6. Unfortunately, due to a malfunction of the recording equipment, there is no visual and very poor audio of the ROI.

7. That said, it is clear that Detective P1 explained his rights to AC and asked him "Can you tell me what that means?" in relation to the right to silence. It is also clear that AC did not repeat in his own words what that right meant to him.

8. Detective P1 then continues: "Do you understand what I just said to you though in relation to the caution?" to which AC replies "Yeah".

9. However, as Bell J said in *DPP v Natale*: "[T]he suspect must actually and not just apparently understand that questions need not be answered."[1]

10. The importance of ensuring a child in the context of a ROI conducted by a police officer understands his/her rights is well established. It is by getting the child to explain a particular right in their own words. This has long been accepted in the law.

11. It is in fact incorporated in the Victorian Police Manual.

12. AC's ROI stands in contrast to that of [*ZW*] who was present at the incident in [*location deleted*], which was also conducted by this informant some 2 hours prior to AC's interview.

13. In that interview each right was compartmentalised and ZW was required to repeat it in her own words.

14. AC is not merely a child but is also an indigenous child. The Anunga Rules enunciated by Justice Foster in the Northern Territory sets out procedures to be followed in all police interviews of indigenous suspects due to what has been termed "gratuitous concurrence".

15. Moreover, AC is suffering from an intellectual disability. It is not to the point that the interviewing officers were not aware of this. It is still relevant in an assessment of whether AC understood his rights.

16. The prosecution have led evidence of a previous ROI conducted with AC on 14.4.23 in which his rights were properly explained to him by [*another police officer*]. The prosecution by implication would seek to rely on that interview to conclude that he understood his rights in the context of the ROI before the Court. Having regard to him being a child with an intellectual disability, I would hesitate to make that inference especially after a lapse of 5 months.

The Independent Person

17. I turn now to the issue of the independent person.

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[1] *DPP v Natale* [2018] VSC 339 at [46] where – in excluding under s90 the record of interview of an elderly Italian man with limited English – Bell J referred with approval to dicta of Coldrey J in *R v Li & Anor* [1993] 2 VR 80, 87.

18. Section 464E of the *Crimes Act 1958* requires a child in custody not to be questioned by police unless a parent or guardian of the child or, if a parent or guardian is not available, an independent person is present.

19. I3P attended the [*location deleted*] police station and filled the role of an independent person for the interview of ZW and subsequently for the interview of AC.

20. On arrival at the police station, I3P had been informed that AC had committed a stabbing.

21. I3P had received initial training for this role, with up-to-date training annually.

22. He agreed that it was not normal for an independent person to fulfill that role for both accused and co-accused but thought it was due to AC having already been in custody for 5 hours.

23. His evidence of the ROI was that he believed that AC understood because police asked him to put his rights in his own words.

24. That is true but it ignores the fact that AC did not in fact do so.

25. I3P went on to say that if he had a situation where a young person didn't or couldn't answer the question to repeat their rights, he would cancel the interview.

26. I3P's evidence seems to blur what is the expected norm in such interviews with what actually occurred in AC's interview.

27. Although he denied it in his evidence before the Court, it is clear that I3P was judgmental of AC. This was never more evident than when he stated in his evidence that on first meeting ZW he thought to himself "What's such a nice girl knocking around with that bloke who committed that crime?"

28. Whether this explains I3P's shortcomings during the ROI or whether it is a lack of training is not to the point. He clearly did not understand his responsibilities and indeed his duty to a child in the context of the interview.

29. According to I3P, all he had to do was ensure that the child understood his rights.

30. But as Bell J said in *Toomalatai*, quoting Hidden J in *R v H (A Child)*:

> "The primary aim of such a provision is to protect children from the disadvantaged position inherent in their age, quite apart from

> impropriety on the part of police. The protective purpose can be met only by an adult who is free, not only to protest against perceived unfairness, but also to advise the child of his or her rights. As the occasion requires, this advice might be a reminder of the right to silence, or an admonition against further participation in the interview in the absence of legal advice."[2]

31. In *JB v R* the New South Wales Court of Appeal, when considering the role of an independent person, stated:

> "In a given situation, the role undertaken by a support person may require that advice be given to a juvenile that he or she may or should remain silent during a police interview; it may require the tendering of advice or the giving of practical assistance during the actual interview itself."[3]

32. In *R v Cortez and others* Dowd J was also of the view that an independent person ought understand "as a person *in loco parentis* that he might intervene to warn someone who may be making the most damning of admissions".[4]

33. I3P, having been informed on arrival at the police station of what AC "had done" and having sat through the interview with ZW, was well aware of the serious admissions that were likely to be made if AC were to answer the questions put to him in the ROI.

34. Yet he sat passively through the interview.

35. His response to this in his evidence was that it was not his responsibility and that he was not qualified to give legal advice.

36. But as Bell J said in *Toomalatai:* "[Y]ou don't need to know a lot about the law to know when a person is about to make damning admissions."[5]

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[2] *R v H (A Child)* (1996) 85 A Crim R 481, 486 quoted with approval by Bell J in *DPP v Toomalatai* (2006) 13 VR 319; [2006] VSC 256 at [62]. At [63] Bell J noted: "These descriptions of the role of an independent person are equally applicable to the person who carries out this function in Victoria under s464E(1)(a) of the *Crimes Act 1958*. There is no material difference between the legislation in New South Wales and Victoria in this regard."

[3] *JB v R* (2012) 83 NSWLR 153 at [30]-[31].

[4] *R v Cortez and others* (Supreme Court of New South Wales, 3.10.2002, unreported) at [13] quoted with approval by Bell J in *DPP v Toomalatai* (2006) 13 VR 319; [2006] VSC 256 at [73].

[5] *DPP v Toomalatai* (2006) 13 VR 319; [2006] VSC 256 at [75] quoting Dowd J in *R v Cortez and others* at [13].

37. It is clear that in the context of AC's interview the independent person should have intervened to remind AC of his right to silence and caution him against further participation as well as the need to obtain legal advice.

Section 464E of the *Crimes Act 1958*

38. I turn now to s464E.

39. As Incerti J stated in *DPP v SA*, s464E "reveals a preference for a young person's parent or guardian to be present with them during police questioning".[6]

40. The evidence on the *voir dire* indicates that the informant P1 was aware that AC resides in residential care but was not sure if they were his legal guardian.

41. Detective P1 directed police officer P2 to contact Child Protection to obtain contact details of AC's mother. He had previously tried to contact AC's father but was unsuccessful.

42. Police officer P2 was told that AC's mother was missing but they provided the contact details of his aunt AU.

43. Police officer P2's evidence was that Child Protection informed him that AU was a suitable person for the ROI. He admits it is possible that he was also told that AU was AC's carer but can't recall.

44. The bottom line is that the officers involved made no attempt to contact AU despite her residing in [*the same town as the police station where the ROI was conducted*].

45. Police officer P2 gave evidence to the effect that he was not told by Child Protection that there was a permanent care order applicable to AC.

46. As it turns out a Permanent Care Order was made on 25.1.2021 granting parental responsibility for AC to AU and TK.

47. In the circumstances of this case and given what was known about AC, why would inquiries not have been made with Child Protection as to any existing care orders made by the Court, given the preference in s464E for a parent or guardian to be present?

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[6] *DPP v SA (Ruling No 4)* [2023] VSC 661 at [16].

48. Indeed, the inference is open that this information was conveyed to police officer P2.

49. Either way it is puzzling, to say the least, why in fact no attempt was made to contact AU.

50. She lives in [*the same town as the police station where the ROI was conducted*], her contact details were provided to the police, she is related to AC and has parental responsibility for him and she was deemed suitable by Child Protection to support AC in the interview process.

Conclusion re s90 of the *Evidence Act 2008*

51. That said, as was made clear in *DPP v James*[7], the unfairness discretion in s90 does not rest upon some impropriety in the investigative process. Nor does it rest on the reliability or otherwise of any admission.

52. However, the fact that AC was not supported by someone who would have protected him from making serious admissions is relevant to the exercise of the s90 discretion.

53. In relation to the discretion to exclude contained in s90 of the *Evidence Act 2008*, I do not regard it as open to me to find as a fact that AC had a reduced awareness and understanding of the caution he received.

54. However, such a finding is not necessary for the application of the discretion. As the Court of Appeal said in *DPP v James*:

> "…We accept that an unacceptable risk that an accused was unable to properly evaluate and exercise his or her rights might in principle render the receipt of evidence at trial unfair. Such a risk might, in an appropriate case, render the receipt of evidence unfair whether or not the judge could be positively satisfied as to the extent the accused's right to silence was in fact compromised.
>
> It will be a matter of fact and degree for the judge to evaluate the totality of the circumstances in issue when assessing the unfairness flowing from such risk.
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> If such a risk were established, it logically follows that no admissions might have been made at all if the risk had not been taken."[8]

[7] [2016] VSCA 106 at [23] per Osborn & Priest JJA.
[8] *DPP v James* [2016] VSCA 106 at [47]-[49] per Osborn & Priest JJA.

55. In the matter before me, having regard to the matters I have addressed, that risk has been made out and it is unacceptable.

56. The ROI will therefore not be admissible in evidence as it is excluded in the exercise of my discretion under s90 of the *Evidence Act 2008*.